

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| MONTGOMERY PUBLIC SCHOOL SYSTEM |) | File No. 0004933287 |
| |) | |
| Application for Waiver and Extension of Time to |) | |
| Meet Substantial Service Requirement for |) | |
| Educational Broadband Radio Service Station |) | |
| WNC347 |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2012

Released: April 2, 2012

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny Montgomery Public School System's (Montgomery) request¹ for an extension of the November 1, 2011 deadline for Educational Broadband Service ("EBS") Station WNC347 in Montgomery, Alabama to demonstrate substantial service. Montgomery has failed to show that it acted with the requisite diligence or that its failure to meet the deadline was caused by circumstances beyond its control. We declare the license terminated as of November 1, 2011.

II. BACKGROUND

2. In 2004, the Commission undertook the radical transformation of the 2496-2690 MHz band to facilitate the development and deployment of advanced wireless services, including wireless broadband.² The Commission radically changed the band plan and technical and licensing rules applicable to EBS licenses and required EBS licensees to transition from their old channel locations to their new channel locations.³

3. On April 27, 2006, the Commission adopted new construction requirements applicable to all BRS and EBS licensees, which were codified at Section 27.14(o) of the Commission's Rules.⁴ Under

¹ File No. 0004933287 (filed Nov. 1, 2011) ("Extension Application").

² See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O and FNPRM*, as appropriate).

³ *Id.*

⁴ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, (continued....)

Section 27.14(o), all BRS and EBS licensees were required to demonstrate substantial service on or before May 1, 2011.⁵ The Commission defines substantial service as a level of service, which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.⁶ A BRS or EBS licensee may make a showing based on meeting the definition of substantial service or based on meeting one of the general safe harbors provided by the Commission in Section 27.14(o)(1) of the Commission's Rules.⁷ In addition, an EBS licensee may make a showing under the educational "safe harbor" the Commission specifically adopted for EBS licensees in Section 27.14(o)(2) of the Commission's Rules.⁸ Many EBS licensees have demonstrated substantial service by meeting this safe harbor.⁹

4. On March 22, 2011, the Wireless Telecommunications Bureau ("Bureau") extended the deadline for EBS licensees to demonstrate substantial service from May 1, 2011 to November 1, 2011.¹⁰

5. Montgomery filed a timely request for extension of the November 1, 2011 substantial service deadline.¹¹ This application is unopposed. Montgomery reports that it has had significant changes in its technology leadership over the past few years and would appreciate additional time to meet the Commission's requirements for use of its wireless signal.¹²

(...continued from previous page)

Second Report and Order, WT Docket No. 03-66, 21 FCC Rcd 5606, 5718-5736 274-310 (2006) (*BRS/EBS Second R&O*).

⁵ 47 C.F.R. § 27.14(o). See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5718-5736 ¶¶ 274-310 (2006) (*BRS/EBS Second R&O*).

⁶ 47 C.F.R. § 27.14(o).

⁷ An EBS or a BRS licensee could meet the substantial service requirement by showing that it meets one or more of the following five general safe harbors: that it constructed six permanent links per one million people for licensees providing fixed point-to-point services; that it provided coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services; that it provided service to "rural areas" or areas with limited access to telecommunications services; that it provided specialized or technologically sophisticated service; or that it provided service to niche markets. 47 C.F.R. § 27.14(o)(1).

⁸ Under the educational "safe harbor," an EBS licensee is deemed to be providing substantial service with respect to all channels it holds if: it is using its spectrum (or spectrum to which its educational services are shifted) to provide educational services within its GSA; the services it provides are actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; and the level of service it provides meets or exceeds the minimum usage requirements specified in the Commission's rules. 47 C.F.R. § 27.14(o)(2).

⁹ The Wireless Telecommunications Bureau has accepted over 2,100 substantial service notifications from EBS licensees who complied with the November 1, 2011 deadline.

¹⁰ See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB/2011) ("*EBS Extension Order*").

¹¹ See 47 C.F.R. § 1.946(e) (request for extension of time to demonstrate coverage must be filed before expiration of coverage period).

¹² Extension Application at 1.

III. DISCUSSION

6. An extension request for a coverage requirement may be granted “if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”¹³ The Commission has consistently found that licensee business decisions are not circumstances beyond the licensee’s control and are not the basis for regulatory relief.¹⁴ Turnover in recordkeeping personnel is not a valid excuse, in and of itself, for failing to meet the construction deadline.¹⁵ Viewed under these standards, we conclude that Montgomery has not justified an extension of time to construct.

7. Montgomery has not provided any evidence it acted diligently prior to the November 1, 2011 deadline to demonstrate substantial service. Our rules state that ordering equipment within 90 days after initial license grant will be presumed to constitute diligent action.¹⁶ Montgomery did not cite any authority for the proposition that promises made at the construction deadline should be considered.

8. We conclude that Montgomery has failed to justify a waiver of the November 1, 2011 substantial service deadline. To be granted a waiver, Montgomery must show that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁷ The underlying purpose of the EBS substantial service requirement is to fulfill our statutory duty to “ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services.”¹⁸ Montgomery has not provided any evidence that granting an extension will promote the public interest. EBS licensees timely built out over 2,100 licenses by the November 1, 2011 deadline. In light of this

¹³ 47 C.F.R. § 1.946(e)(1).

¹⁴ See, e.g., *Redwood Wireless Minnesota, LLC, Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercise of business judgment and were not outside Petitioner’s control); *Eldorado Communications LLC, Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); *Bristol MAS Partners, Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was business decision); *AAT Electronics Corporation*, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee’s control); *Business Radio Communications Systems, Inc.*, 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee’s control); *Texas Two-Way, Inc.*, 98 FCC 2d 1300 (1984), *aff’d sub nom.*, *Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

¹⁵ See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission’s Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶ 21 (1999) (*ULS MO&O*) (turnover in recordkeeping personnel, failure to check computer records, or simple forgetfulness are not valid excuses for failure to file a timely renewal application).

¹⁶ See 47 C.F.R. § 1.946(e)(2).

¹⁷ See 47 C.F.R. § 1.925(b)(3); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3.

¹⁸ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, citing 47 U.S.C. § 309(j)(4)(B).

applicant's lack of diligence, we believe granting an extension would send the wrong signal to those licensees who acted diligently to provide service. Granting this extension would hinder our ability to strictly enforce construction requirements and meet our statutory duties. We therefore conclude that granting a waiver would be inconsistent with the underlying purpose of the EBS substantial service requirement.

9. Montgomery also failed to justify a waiver under the second prong of the waiver standard. Montgomery requests a waiver in order to have "additional time to meet FCC requirements for the use of this wireless signal" because Montgomery has had "significant changes in [its] technology leadership over the last few years."¹⁹ We question Montgomery's motivation to provide services when no concrete actions were taken to provide service prior to the November 1, 2011 deadline. Moreover, Montgomery ignores the Commission's countervailing duty, as charged by Congress, to "ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services." Montgomery has failed to explain why it would be inequitable or unduly burdensome to enforce the substantial service deadline when most EBS licensees, including many licensees in rural areas, were able to meet that deadline.

10. An authorization for an EBS license automatically terminates if the licensee fails to meet construction or coverage requirements.²⁰ In light of our conclusion that grant of this extension application is not in the public interest, we find that the license for Station WNC347 covering rural markets surrounding Montgomery, AL automatically terminated on November 1, 2011, the date that EBS licensees were required to demonstrate substantial service. We will therefore deny the Extension Application.

IV. CONCLUSION AND ORDERING CLAUSES

11. Montgomery has failed to justify an extension of time to meet the substantial service deadline for its station or to justify a waiver of the November 1, 2011 deadline for establishing substantial service. We therefore deny the Extension Application and declare the license automatically terminated as of November 1, 2011.

12. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the above-captioned extension application (File No. 0004933287) filed November 1, 2011 IS DENIED.

¹⁹ Extension Application at 1.

²⁰ See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).

13. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the license for Station WNC347 IS DECLARED TERMINATED as of November 1, 2011.

14. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau